

THE ROLE OF THE PROSECUTOR AND THE GRAND JURY IN POLICE USE OF DEADLY FORCE CASES: RESTORING THE GRAND JURY TO ITS ORIGINAL PURPOSE

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ABSTRACT

In deciding whether and what to charge in a criminal case, the prosecutor looks to three different factors. The first is legal: is there probable cause that the defendant committed this crime? The second is practical: if the case goes to trial, will there be sufficient evidence to convict the defendant beyond a reasonable doubt of this crime? And the third is equitable: should the defendant be charged with this crime? The prosecutor is uniquely qualified to answer the first and second question, but the third is a bit trickier. If it is used properly, the grand jury could provide valuable guidance to the prosecutor in answering this third question. This role could be especially useful in police use of deadly force cases.

To see how this would work, this Article examines three prominent police use of force cases and analyzes how the prosecutor used the grand jury in each case. In the case of the shooting of Freddy Gray in Baltimore, the prosecutor treated the grand jury the way most prosecutors treat grand juries—as a rubber stamp for her pre-existing decision to indict. The result was disastrous, as the prosecutor was unable to obtain a conviction against any of the police officers. In the case of the shooting of Tamir Rice in Cleveland, the prosecutor used the grand jury as political cover: the prosecutor had already decided *not* to indict the case and presented a weak case to the grand jury to ensure that the grand jury would not return an indictment. The subsequent reaction by the community led to the prosecutor losing his job in the next election. Finally, in the case of the shooting of Michael Brown in Ferguson, the prosecutor decided to use the grand jury for its original purpose by allowing it to exercise its independent judgment as to whether an indictment was appropriate in the case. In doing so, he was able to reach a more just result than we saw in either of the other two case studies.

This Article then discusses how to encourage police officers to follow the example of the Ferguson prosecutor and allow grand juries to exercise their own independent judgment. One of the easiest ways to accomplish this goal would be to relax the grand jury secrecy rules, most of which are outdated and all of which decrease the legitimacy of the grand jury.

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I. THE ROLE OF THE PROSECUTOR AND THE GRAND JURY

A. The Prosecutor

The prosecutor is the most powerful figure in the criminal justice system.¹ No criminal case can begin without her, and any criminal case can end at any time based solely on her decision. Moreover, in the 95% of criminal cases that end in a plea bargain,² it is the prosecutor who dominates the negotiation, with her hand strengthened by the proliferation of crimes in our penal codes and the high potential sentences authorized by legislatures.³

Along with this power comes the ability to exercise discretion in each individual case. The prosecutor is supposed to use her training and experience to exercise this discretion and determine the just outcome for each case.⁴ However, that ideal model is not always borne out in practice.⁵ Exercising this discretion—deciding whether to

¹ See, e.g., Angela J. Davis, *Federal Prosecutors Have Way Too Much Power*, N.Y. TIMES (Jan. 14, 2015), <http://www.nytimes.com/roomfordebate/2012/08/19/do-prosecutors-have-too-much-power/federal-prosecutors-have-way-too-much-power>; Cameron Todd Willingham, *How Prosecutors Came to Dominate the Criminal-Justice System*, THE ECONOMIST (Oct. 4, 2014), <http://www.economist.com/news/united-states/21621799-how-prosecutors-came-dominate-criminal-justice-system-kings-courtroom>. As Robert Jackson, the former U.S. Attorney General, Supreme Court Justice, and chief prosecutor at the Nuremberg trials said, “The prosecutor has more control over life, liberty and reputation than any other person in America.” Willingham, *supra* note 1.

² Tim Lynch, *The Devil’s Bargain: How Plea Agreements, Never Contemplated by the Framers, Undermine Justice*, CATO INST. (July 2011), <https://www.cato.org/publications/commentary/devils-bargain-how-plea-agreements-never-contemplated-framers-undermine-justice>.

³ See Gerald E. Lynch, *Our Administrative System of Criminal Justice*, 66 FORDHAM L. REV. 2117, 2123-29 (1998) (arguing that prosecutors have so much power that they are essentially administrators in an inquisitorial justice system).

⁴ See H. Richard Uviller, *Dispassion in a Passionate Pursuit*, 68 FORDHAM L. REV. 1695, 1696 (2000).

⁵ See, e.g., Nick Schwellenback, *Hundreds of Justice Department Attorneys Violated Professional Rules, Laws, or Ethical Standards*, POGO (Mar. 13, 2014), <http://www.pogo.org/our-work/reports/2014/hundreds-of-justice-attorneys-violated-standards.html?referrer=https://www.google.com/>.

charge and what to charge⁶—is the most important role of the prosecutor, and it is a fundamental aspect of our criminal justice system.⁷

In deciding whether and what to charge, the prosecutor looks to three different factors:

- (1) Legal—Is there probable cause that the defendant committed this crime?
- (2) Practical—If the case goes to trial, will there be sufficient evidence to convict the defendant beyond a reasonable doubt of this crime?
- (3) Equitable—Should the defendant be charged with this crime?⁸

The prosecutor is uniquely qualified to answer the first and second question. She is the legal actor who is most familiar with the facts and available evidence in the case, and she has been trained to know what constitutes probable cause and proof beyond a reasonable doubt. But the third question is a bit trickier.⁹ The prosecutor has some expertise in deciding what a fair and equitable charge would be based on her own past cases and those of others in her office. She is also (hopefully) responsive to the local community, whose members may care far more about enforcing some crimes than others. For example, in some jurisdictions, the community may want the prosecutor to focus on firearms possession but is not as concerned about marijuana possession or shoplifting. The prosecutor, or her supervisor, also may have her own political or personal agenda and decide to crack down on drug crimes, domestic violence, or white-collar crimes while saving resources by undercharging other types of cases. And, as this author has argued elsewhere,¹⁰ the grand jury conceivably could provide input on this equitable question, serving as the voice of the community with regard to certain types of crimes or to specific defendants. If a prosecutor has a particularly sympathetic defendant, or if the case involves significant but legally irrelevant mitigating factors, the prosecutor could present these facts to the grand jury to determine whether the grand jury still wants to go forward with the case. But for the most part, this role for

⁶ Of course, the prosecutor exercises discretion in other ways as well—for example, in deciding what terms to seek (or accept) in a plea negotiation, or in recommending a specific sentence after conviction. But the charging decision is by far the most important, and it is the only one which involves the grand jury. Alafair S. Burke, *Prosecutorial Passion, Cognitive Bias, and Plea Bargaining*, 91 MARQ. L. REV. 183, 186, 189 (2007).

⁷ Other actors in the criminal justice system also exercise discretion in carrying out their jobs—police decide whether to make an arrest; judges decide how long to sentence after conviction—but none of their roles is as essential as the prosecutor's in giving the criminal justice system flexibility. Kevin Walsh, *The Mandatory Arrest Law: Police Reaction*, 16 PACE L. REV. 97, 105 (1995).

⁸ See Uviller, *supra* note 4, at 1695-98.

⁹ See Bennett L. Gershman, *Prosecutorial Ethics and Victims' Rights: The Prosecutor's Duty of Neutrality*, 9 LEWIS & CLARK L. REV. 559, 570 (2005); Uviller, *supra* note 4, at 1702-05.

¹⁰ Ric Simmons, *Re-Examining the Grand Jury: Is There Room for Democracy in the Criminal Justice System*, 82 BOS. U. L. REV. 1, 44-51 (2002).

the grand jury is only theoretical; in practice, the grand jury usually adds very little of substance to the charging decision.

B. The Grand Jury

The widespread impotence and irrelevance of the grand jury¹¹ has been well documented elsewhere;¹² this Article only reviews the highlights here. On the federal level, grand juries indict over 99% of the cases brought before them,¹³ while currently over half of the states do not even require a grand jury in order to initiate a felony case.¹⁴ In states where prosecutors do utilize a grand jury, the presentation is typically quick and perfunctory, involving a law enforcement officer reading a case file, and then the prosecutor initiates a legal charge.¹⁵

A more interesting question is *how* the grand jury evolved into a mere rubber stamp for the prosecutor—after all, this was an institution so revered that it was included in the Bill of Rights and used in some administrative and quasi-legislative roles in the early days of the Republic.¹⁶ But two major changes have occurred over the centuries to siphon power away from the grand jury. The first is the rise of the professional prosecutor, who now essentially fulfills the grand jury's traditional role, both in terms of gathering evidence and reviewing cases.¹⁷ The second is a series of legal changes: as professional prosecutors became more widespread, a series of Supreme Court cases shifted power from the grand jury to the prosecutor.¹⁸ These decisions gave prosecutors the right to present hearsay testimony in the grand jury,¹⁹ held that the exclusionary rule does not apply to grand jury proceedings,²⁰ applied a harmless error analysis to any procedural errors that occur during the proceedings,²¹ and ruled that a prosecutor had no duty to present exculpatory evidence to a grand

¹¹ Throughout this Article, the phrase "grand jury" refers to the charging grand jury, not the investigative grand jury.

¹² See, e.g., William J. Campbell, *Eliminate the Grand Jury*, 64 J. CRIM. L. & CRIMINOLOGY 174 (1973).

¹³ Thaddeus Hoffmeister, *The Grand Jury Legal Advisor: Resurrecting the Grand Jury's Shield*, 98 J. CRIM. L. & CRIMINOLOGY 1171, 1176 (2008); see generally Offices of the U.S. Att'y, *Annual Statistical Reports*, DOJ, <http://www.justice.gov/usao/resources/annual-statistical-reports> (last updated Mar. 10, 2016).

¹⁴ SARA SUN BEALE ET AL., *GRAND JURY LAW AND PRACTICE*, § 1-7, 1-32 (2d ed. 2002).

¹⁵ See Simmons, *supra* note 10, at 32.

¹⁶ See, e.g., RICHARD G. YOUNGER, *THE PEOPLE'S PANEL: THE GRAND JURY IN THE UNITED STATES*, 1634-1941 11, 16 (1963).

¹⁷ Roger A. Fairfax Jr., *Grand Jury Innovation: Toward a Functional Makeover of the Ancient Bulwark of Liberty*, 19 WM. & MARY BILL OF RIGHTS J. 339, 344 (2010).

¹⁸ *Id.*

¹⁹ Costello v. United States, 350 U.S. 359, 364 (1956).

²⁰ United States v. Calandra, 414 U.S. 338, 354 (1974).

²¹ United States v. Mechanik, 475 U.S. 66, 67 (1986). This means that as long as the grand jury convicts the defendant, he cannot challenge any procedural mistakes or prosecutorial misconduct in the grand jury. *Id.*

jury.²² Through this series of decisions, the Supreme Court made it clear that the courts should exercise virtually no supervision of the grand jury. This notion was based on the legal fiction that the grand jury was an independent body, separate from both the prosecutor's office and the court system.²³ As a result, in almost all jurisdictions, if the prosecutor wants an indictment from the grand jury, she can easily obtain one.²⁴ The grand jury was originally meant to be a "shield" of independent citizens protecting the general public from the government's charging power; today, it is simply unable to perform that function.

This is not to say that the charging grand jury performs *no* useful function in the modern criminal justice system. Prosecutors can, and often do, use the grand jury in two important ways. First, if the prosecutor has a witness who may be reluctant or unreliable—such as in a case involving organized crime or domestic violence—she can call that witness to the grand jury in order to formally memorialize his testimony.²⁵ The grand jury testimony is useless if the witness is unavailable at trial,²⁶ but if the witness does testify at trial and changes his story or claims lack of memory, his prior statements before the grand jury can be admitted as substantive evidence.²⁷

Second, the prosecutor may be unsure about what a witness will say under oath or how he will present himself to jurors at trial.²⁸ The prosecutor can call the witness before the grand jury to observe both the witness's demeanor and the grand jurors' reactions. This observation could be useful if the witness is a victim of sexual assault or an informant with a significant criminal history.

However, for the most part, prosecutors in most jurisdictions²⁹ treat grand juries as nothing more than rubber stamps, meaning that the grand juries serve no actual purpose at all. As we will see in the next section, however, cases in which police officers are accused of unlawful lethal use of force tend not to follow this well-known script.

²² *United States v. Williams*, 504 U.S. 36, 55 (1992).

²³ *Id.* Justice Stevens noted in his *Williams* dissent that as a result of the Supreme Court's rulings, federal courts have "no power to enforce the prosecutor's obligation to protect the fundamental fairness of [grand jury] proceedings." *Id.* at 55-56 (Stevens, J., dissenting).

²⁴ *Id.* at 65.

²⁵ *Id.* at 62-63.

²⁶ *See* FED. R. EVID. 804(b)(1) (providing that if a witness is unavailable, his prior statements under oath are admissible only if the witness had been subject to cross-examination when he made them).

²⁷ *See* FED. R. EVID. 801(d)(1).

²⁸ *See id.*; *see also* Peter F. Vaira, *Role of the Prosecutor Inside the Grand Jury Room: Where is the Foul Line*, 75 J. CRIM. L. & CRIMINOLOGY 1129, 1134 (1984).

²⁹ There are some jurisdictions in which the procedural rules of the grand jury are more restrictive, which lead to prosecutors presenting a more complete version of the case to the grand jury. Simmons, *supra* note 10, at 16-29 (examining the differences between the New York grand jury and the federal grand jury).

II. THE ROLE OF THE GRAND JURY IN POLICE LETHAL USE OF FORCE CASES: THREE CASE STUDIES

Police lethal use of force cases are challenging for prosecutors for a number of reasons. First, these cases tend to be high-profile, and publicity always creates extra challenges for criminal cases. For example, the jury pool may be tainted, and the prosecutor's actions and statements will come under intense scrutiny, which may result in decisions that are less just or less strategically sound.³⁰ Second, prosecutors work closely with the police, so there may be a conflict of interest when the prosecutor needs to exercise her judgment as to whether to bring charges against a police officer.³¹ Third, even if a prosecutor decides to bring charges and aggressively prosecutes the case, such cases are very difficult to win.³² There are various reasons for this, but for the most part, it appears that jurors are reluctant to second-guess the split-second decisions that police officers must exercise in life-or-death situations.³³

Cases involving police lethal use of force are also unusual because grand juries tend *not* to indict these cases.³⁴ This low indictment rate is somewhat puzzling at

³⁰ *Id.* at 8.

³¹ See generally Kate Levine, *Who Shouldn't Prosecute the Police*, 101 IOWA L. REV. 1447 (2016) (discussing the issues prosecutors face when bringing charges against police officers).

³² The Washington Post tracked twenty-three trials of police officers between 2005 and 2015 and found that seventeen of the twenty-three resulted in an acquittal. *Police Officers Prosecuted For Use of Deadly Force*, WASH. POST (Apr. 11, 2015), <https://www.washingtonpost.com/graphics/investigations/police-shootings/>; see also Kevin Gresha et al., *After Tensing Mistrial, What Will Deters Do Next?*, CINCINNATI.COM (Nov. 13, 2016), <http://www.cincinnati.com/story/news/tenzing/2016/11/12/tenzing-jury-continue-deliberations-saturday/93671484/>. Most recently, Officer Ray Densing in Cincinnati was charged with murder and voluntary manslaughter for killing a black motorist who tried to drive away from a traffic stop. Gresha et al., *supra* note 32. Densing's body camera captured the entire encounter on video, and the case appeared to be very strong supporting a conviction of one of the two charges. *Id.* Furthermore, the chief prosecutor made clear in public statements that he was aggressively pursuing a conviction. *Id.* However, after three days of deliberation, the jury deadlocked, with four jurors voting for acquittal on all charges and nine jurors voting for acquittal on the murder charges. *Id.*

³³ Emily Shapiro & Julia Jacobo, *Why It May Be Hard to Convict an Officer in Cases of Police-Involved Deaths*, ABC NEWS (Dec. 7, 2016), <http://abcnews.go.com/US/jurors-reluctant-convict-police-cases-officer-involved-deaths/story?id=44008416>; Tracy Wood, *Reluctant Juries Often Make Prosecuting Police Difficult*, VOICE OF OC (Sept. 22, 2011), <http://voiceofoc.org/2011/09/reluctant-juries-often-make-prosecuting-police-difficult/>.

³⁴ James C. McKinley, Jr. & Al Baker, *Grand Jury System, with Exceptions, Favors the Police in Fatalities*, N.Y. TIMES (Dec. 7, 2014), <http://www.nytimes.com/2014/12/08/nyregion/grand-juries-seldom-charge-police-officers-in-fatal-actions.html> (citing Phil Stinson, *Police Integrity Lost: Police Crimes Involving Firearms*, BOWLING GREEN ST. U. (Aug. 20, 2014), <https://blogs.bgsu.edu/pilproject/2014/08/20/police-crime-involving-firearms/>). The research shows 2,600 "justifiable police homicides" from 2004-2011, with only forty-one officers charged with murder or manslaughter over that period. *Id.* Investigations in specific cities support the view that most of these decisions not to charge are processed through a grand jury: in Houston, grand juries have not indicted a single Houston police officer between 2009 and 2014, even though over thirty unarmed civilians were shot in that five-year period. James

first. Although these cases are harder to win at trial, they are not inherently harder to indict: the legal rules that apply to the prosecutor and the grand jury are just as lenient in police lethal use of force cases as they are in every other criminal case.³⁵ In other words, the prosecutor could get an indictment in nearly every single police lethal use of force case if she wanted to do so. Thus, the reason for lower indictment rates is not because the grand jury is acting as a neutral shield against overzealous prosecution; that role disappeared decades ago and is unlikely to ever return.³⁶

Instead, the lower indictment rates in cases involving police lethal use of force are evidence that prosecutors are using the grand juries to perform some other function. Exactly what that function is depends on the prosecutor's motive. This Article argues that there are two possible functions that a grand jury could provide in police lethal use of force cases:

- (1) The prosecutor is using the grand jury as political cover, so that a prosecutor who does not want to move forward can claim that the potentially unpopular decision not to press charges was made by the grand jury.
- (2) The prosecutor is using the grand jury to guide her exercise of prosecutorial discretion by obtaining feedback from the community about the strength of the case and the equitable decision of whether charges are appropriate.³⁷

In order to understand and evaluate these two possible functions, this Article will examine three different cases in which a grand jury considered a police lethal use of force case.

Pinkerton, *Bulletproof: Part 3: Hard to Charge*, HOUSTON CHRONICLE, <http://www.houstonchronicle.com/local/investigations/item/Bulletproof-Part-3-Hard-to-charge-24421.php> (last visited Mar. 12, 2017). In Dallas, grand juries considered charges in eighty-one police shootings between 2008 and 2012 and only indicted one officer. *Id.*

³⁵ Ben Casselman, *It's Incredibly Rare for a Grand Jury to Do What Ferguson's Just Did*, FIVETHIRTYEIGHT (Nov. 24, 2014, 9:30 PM), <http://fivethirtyeight.com/datalab/ferguson-michael-brown-indictment-darren-wilson>.

³⁶ It is also a role which the grand jury is not particularly qualified to fulfill because it is made up of lay people who have no training or experience in determining whether probable cause does in fact exist in a particular case.

³⁷ One journalist sees three possible reasons for the low indictment rates of police officers. Casselman, *supra* note 35. The first is juror bias, meaning that jurors are reluctant to second-guess police officers when they use force. *Id.* This is certainly a reason why these cases are harder to win at trial, but given the massive procedural advantages prosecutors enjoy in the grand jury, it does not explain low indictment rates. *Id.* The second is prosecutorial bias: prosecutors intentionally present a less compelling case. *Id.* And the third is public pressure: prosecutors feel they have to bring a case in front of a grand jury even though they know it is weak. *Id.* The second two reasons are actually describing the same phenomenon—what I call “political cover”: the prosecutor feels public pressure to bring charges, but does not want to bring charges (either because of pro-police bias or because the case is not strong), and so the prosecutor intentionally makes a weak presentation to the grand jury.

A. Freddie Gray: Grand Jury Business as Usual

One category of police lethal use of force cases involves situations where the prosecutor treats the grand jury the same as always: a rubber stamp to automatically approve of charges upon which she has already decided. There is nothing inherently unethical or inappropriate about this course of action, as it is standard procedure for the vast majority of criminal cases that come before a grand jury, but it represents a lost opportunity to make use of the grand jury. As the first case study makes clear, that lost opportunity can lead to embarrassing failures at the trial level.

On April 12, 2015, the Baltimore police arrested Freddie Gray for allegedly possessing an illegal switchblade knife.³⁸ The police placed Gray into a transport van and drove him unrestrained through the city for approximately half an hour.³⁹ By the end of the drive, Gray was in a coma from injuries suffered during the transport, and he died of these injuries one week later.⁴⁰

The prosecutor in the case, Baltimore City Attorney Marilyn Mosby, immediately announced that she was going to bring charges against six police officers for their role in Gray's death.⁴¹ Her assistant prosecutors presented evidence to a grand jury for two weeks and obtained against all six defendants indictments including charges nearly identical to the ones that Mosby had originally sought.⁴² The cases were brought to trial a few months later. The prosecutor's results were with disastrous: the first trial ended in a mistrial while the next three resulted in acquittals. The prosecutor ultimately dismissed the charges against the remaining defendants.⁴³

Defenders of Mosby's decision argue that it is always difficult to convict police officers for these kinds of crimes and that she was correct to respond to the clear preferences of the community that she represented by bringing these cases to trial.⁴⁴ Conversely, Mosby's critics respond that the case was overcharged in response to political pressure and that she abdicated her duty to exercise her own independent legal judgment in determining whether she did in fact have the evidence necessary to

³⁸ Sarah Almukhtar et al., *Freddie Gray Case Ends with No Convictions of Any Police Officers*, N.Y. TIMES (July 27, 2016), <http://www.nytimes.com/interactive/2015/04/30/us/what-happened-freddie-gray-arrested-by-baltimore-police-department-map-timeline.html>.

³⁹ *Id.*

⁴⁰ *Id.*; see also *Freddie Gray's Death in Police Custody: What We Know*, BBC NEWS (May 23, 2016), <http://www.bbc.com/news/world-us-canada-32400497>.

⁴¹ Wil S. Hylton, *Baltimore vs. Marilyn Mosby*, N.Y. TIMES (Sept. 28, 2016), <https://www.nytimes.com/2016/10/02/magazine/marilyn-mosby-freddie-gray-baltimore.html>.

⁴² *Grand Jury Indicts Baltimore Police in Death of Freddy Gray*, GMA NEWS (May 22, 2015), <http://www.gmanetwork.com/news/story/491162/news/world/grand-jury-indicts-baltimore-police-in-death-of-freddie-gray>. The grand jury charged the six officers with twenty-five crimes, from reckless endangerment against all the officers to second-degree depraved heart murder for the most culpable. *Id.* It did not bring an indictment for false imprisonment, although Mosby had reportedly sought to charge two officers with that crime. Almukhtar et al., *supra* note 38.

⁴³ *Id.*

⁴⁴ Hylton, *supra* note 41.

convict in this situation.⁴⁵ Regardless of either position, there is no question that she overreached in her charging decision. When a prosecutor charges a defendant with murder and cannot even obtain a reckless endangerment conviction, she has obviously miscalculated the situation. As we have seen, this type of miscalculation is not uncommon in police lethal use of force cases.

B. Tamir Rice: Grand Jury as Political Cover

Although Mosby has been roundly criticized for exercising poor judgment and possibly allowing political considerations to affect her prosecutorial discretion, she at least acknowledged the decision as her own and took responsibility for it. Unfortunately, police lethal use of force cases are so politically-charged that not every prosecutor has such principles, and the grand jury gives such prosecutors a convenient way to avoid accountability.

In a second category of police lethal use of force cases, the prosecutor does not want to indict the case, but she does not have the political will to take responsibility for that decision. Thus, she intentionally presents a weak case to the grand jury, which leads the grand jury to issue a no true bill. The prosecutor can then disingenuously respond to the community that the decision to charge a defendant rests with the grand jury, and in this case, the grand jury refused to indict the case.

In Ohio, Cuyahoga County Prosecutor Timothy McGinty took this course of action when he handled Officer Timothy Loehmann's shooting of twelve-year old Tamir Rice. On November 22, 2014, Officer Loehmann and his partner Frank Garmack responded to a 911 call that reported a person was sitting on a swing in a public park in Cleveland, Ohio, pointing a gun at people.⁴⁶ As the police car pulled up to Tamir Rice in the park, Officer Loehmann saw that Rice was holding what appeared to be a gun, and within two seconds, the officer fatally shot the child.⁴⁷ The item in Rice's hand turned out to be a realistic-looking toy replica of a gun.⁴⁸

Prosecutor McGinty took no official action on the case for many months, as he was waiting first for a lengthy police investigation to be completed, and then he commissioned two outside experts on police use of force who were widely considered to have a pro-police bias.⁴⁹ In response to a citizen's petition, a Municipal Court Judge determined that there was probable cause to charge Officer Loehmann with a number of crimes, including murder, but the prosecutor still failed to bring the case to a grand jury until late October 2015, eleven months after the shooting.⁵⁰

⁴⁵ *Id.*

⁴⁶ Elahe Izade & Peter Holley, *Video Shows Cleveland Officer Shooting 12-Year-Old Tamir Rice Within Seconds*, WASH. POST (Nov. 26, 2014), https://www.washingtonpost.com/news/post-nation/wp/2014/11/26/officials-release-video-names-in-fatal-police-shooting-of-12-year-old-cleveland-boy/?utm_term=.e9329c0abc8e.

⁴⁷ *Id.*

⁴⁸ *Id.*

⁴⁹ Cory Shaffer, *Grand Jury Hearing Evidence in Tamir Rice Shooting*, CLEVELAND.COM (Oct. 27, 2015), http://www.cleveland.com/metro/index.ssf/2015/10/grand_jury_hearing_evidence_in.html.

⁵⁰ Cory Shaffer, *Tamir Rice Shooting Was Tragic but Reasonable: Prosecution Experts*, CLEVELAND.COM (Oct. 10, 2015), http://www.cleveland.com/metro/index.ssf/2015/10/tamir_rice_shooting_was_tragic.html.

As the Gray case (and countless others) have shown, a prosecutor can obtain an indictment for any case if he or she chooses to do so. However, Prosecutor McGinty did not conduct Loehmann's possible indictment as an ordinary grand jury presentation. Independent reports from witnesses who testified in the Rice grand jury show that the prosecutors were acting more like defense attorneys, aggressively cross-examining the witnesses who argued that the killing was unjustified.⁵¹ Meanwhile, the two defendant-officers were invited to the grand jury to read exculpatory statements and were not cross-examined at all.⁵² The result was predictable: after two months of hearing evidence, the grand jury did not indict the case.⁵³ The most reasonable explanation for the grand jury's failure to indict is that the prosecutor did not want an indictment, but he also did not want to take responsibility for that decision himself. Instead, he used the grand jury as a convenient tool to take responsibility for the decision; at the end of the process, he could point to the grand jury as evidence that no charges were appropriate in the case. "If you don't trust the grand jury," McGinty explained, "you don't trust your neighbors."⁵⁴

The prosecutor's actions in the Tamir Rice shooting case were the polar opposite of those that the prosecutor took in Freddie Gray's case. Here, in the Tamir Rice case, was a prosecutor who, unlike Mosby in Gray's case, apparently did not believe that the officers should be charged but also, unlike Mosby, refused to take responsibility for the decision on his own. McGinty's use of the grand jury for this purpose was dishonest, and the extreme measures he took to accomplish this purpose made his dishonesty transparent to the community. Less than three months after the grand jury failed to indict the officers in the Rice case, Cuyahoga County residents voted McGinty out of office.⁵⁵

C. Michael Brown: Grand Jury as a Legitimate Community Voice

In the Gray case, the grand jury served no actual purpose, and in the Rice case, the institution was used for political cover. However, as alluded to earlier, the grand jury can still perform a useful and legitimate task in these cases, so long as the prosecutor is willing to let that happen. If given a chance, a grand jury is perfectly capable of evaluating the strength of a case and deciding whether charging the defendant is justifiable on equitable grounds. All that is necessary is for the

⁵¹ Richard A. Oppel, Jr. & Mitch Smith, *Tamir Rice's Family Clashes with Prosecutor Over Police Killing*, N.Y. TIMES (Dec. 23, 2015), <https://www.nytimes.com/2015/12/24/us/tamir-rices-family-and-prosecutor-quarrel-over-release-of-evidence.html>.

⁵² Emily Shapiro, *Grand Jury Declines to Indict Officers in Tamir Rice Case, Prosecutor Says*, ABC NEWS (Dec. 28, 2015), <http://abcnews.go.com/US/prosecutor-make-announcement-tamir-rice-grand-jury-investigation/story?id=35977877>.

⁵³ See Ashley Fantz, et al., *Tamir Rice Shooting: No Charges for Officers*, CNN (Dec. 28, 2015), <http://www.cnn.com/2015/12/28/us/tamir-rice-shooting/index.html>.

⁵⁴ Sean Flynn, *The Tamir Rice Story: How to Make a Police Shooting Disappear*, GQ (July 14, 2016), <http://www.gq.com/story/tamir-rice-story>.

⁵⁵ Phillip Morris, *Voters Dumped Tim McGinty for the Devil They Don't Know*, CLEVELAND.COM (Mar. 18, 2016), http://www.cleveland.com/morris/index.ssf/2016/03/voters_dumped_tim_mcginty.html.

prosecutor to present a complete, unbiased case to the grand jury rather than the bare bones evidence that is usually presented. In modern times, the duties of evaluating the strength of the case and deciding whether to charge belong to the prosecutor. But, this reality does not prevent the prosecutor from turning to the grand jury for an advisory opinion on the questions. This is arguably what occurred in Ferguson, Missouri, when the prosecutor had to decide whether to charge Officer Darren Wilson with the killing of Michael Brown.

The case began on August 9, 2014, when Officer Wilson shot Michael Brown in the street.⁵⁶ Prosecutor Robert McCulloch took the case to the grand jury on August 20, eleven days after the shooting.⁵⁷ The prosecutors presented the grand jury with over sixty witnesses over a three-month period, and the defendant himself testified and was subject to cross-examination.⁵⁸ After the grand jury returned a no true bill, McCulloch released nearly the entire transcript of the grand jury proceedings to the public.⁵⁹

The shooting of Michael Brown represented a very challenging case for the prosecutor. Various eyewitnesses, including the defendant himself, gave different recollections of the nature of the confrontation between Wilson and Brown.⁶⁰ The community of Ferguson underwent weeks of protests, some of them violent, and the case attracted national attention.⁶¹ Given the conflicting testimony, it was hard to determine whether the evidence would support a guilty verdict at trial or even whether a crime occurred at all. Given the complex political and social repercussions of the event, it was hard to determine whether, even if Officer Wilson technically could be convicted of a crime, it was appropriate to charge him with one. A prosecutor certainly has the duty to make these decisions, and she certainly has the right to do so without any meaningful input from the grand jury, as Mosby did in Baltimore.⁶² However, a more sensible course of action is for the prosecutor to use the grand jury to advise in these determinations. Then, if the case does go forward, a complete and unbiased presentation to the grand jury can provide the prosecutor with valuable feedback on the potential weak points that need to be strengthened before trial.

⁵⁶ *What Happened in Ferguson?*, N.Y. TIMES (Aug. 19, 2015), <http://www.nytimes.com/interactive/2014/08/13/us/ferguson-missouri-town-under-siege-after-police-shooting.html>.

⁵⁷ Anya Van Wagtendonk, *Grand Jury Won't Indict Officer in Michael Brown Death*, PBS NEWSHOUR (Nov. 24, 2014), <http://www.pbs.org/newshour/rundown/grand-jury-decides-not-to-indict-darren-wilson-in-shooting-death-of-michael-brown/>.

⁵⁸ Editorial, *The Grand Jury Says No. Now St. Louis Must Make the Most of It*, ST. LOUIS POST-DISPATCH (Nov. 24, 2014), http://www.stltoday.com/news/opinion/columns/the-platform/editorial-the-grand-jury-says-no-now-st-louis-must/article_44813b31-abc9-5280-ab8f-4ce23859fa7.html [hereinafter *The Grand Jury Says No*].

⁵⁹ Erik Echholm, *Witnesses Told Grand Jury That Michael Brown Charged at Darren Wilson, Prosecutor Says*, N.Y. TIMES (Nov. 24, 2014), <https://www.nytimes.com/2014/11/25/us/witnesses-told-grand-jury-that-michael-brown-charged-at-darren-wilson-prosecutor-says.html>.

⁶⁰ *Id.*

⁶¹ *The Grand Jury Says No*, *supra* note 58.

⁶² See discussion *supra* Sections I.A-B.

III. RECLAIMING THE GRAND JURY AS A LEGITIMATE VOICE OF THE COMMUNITY

These case studies are not atypical. Cases involving police lethal use of force routinely challenge prosecutors. Often, political pressure compels prosecutors to bring charges that they cannot prove at trial. On other occasions, prosecutors do not want to bring charges—perhaps for legitimate reasons—but are unwilling to take responsibility for that decision. In both cases, the legitimacy of the grand jury suffers. In the first case, the grand jury is (rightfully) seen as a passive tool of the prosecutor, willing to approve any criminal charge no matter how problematic the case might be. In the second case, the prosecutor uses the grand jury as a scapegoat and portrays it as an unaccountable, anonymous body that considers evidence in secret before issuing unpopular decisions. Neither of these two options is helpful to the image of the grand jury or of the criminal justice system as a whole.

Instead, prosecutors should feel compelled to use the grand jury to assist them in their exercise of prosecutorial discretion. Some prosecutors, like Robert McCullough in Ferguson, have recognized the value of grand juries in these situations, but most prosecutors have not. Thus, in order to encourage prosecutors to use grand juries fairly and effectively, there should be increased transparency in the process. Transparency will deter prosecutors from intentionally making weak presentations to the grand jury, and it will clarify the role that grand juries play in the charging decision.

Traditionally, the secrecy of the grand jury process has been considered critical to the grand jury's independence. In truth, secrecy merely contributes to the prosecutor's total control over the grand jury. Although wholesale reform of the grand jury may be politically impossible, smaller scale changes to the secrecy provision could be feasible, especially in the context of police lethal use of force cases.

A. Costs of Secrecy

Grand jury secrecy is venerated as one of the most fundamental aspects of the institution. This secrecy was initially created to maintain the independence of the grand jury. Originally, even the prosecutor was not permitted in the grand jury because the grand jury was supposed to run independently from all government bodies.⁶³ However, as the criminal justice system has evolved and the prosecutor has gained more control over the grand jury, courts have turned to other reasons to justify grand jury secrecy. In modern times, courts cite five different justifications for grand jury secrecy:

- (i) To prevent the escape of the defendant;
- (ii) To prevent tampering with the grand jurors;
- (iii) To prevent tampering with witnesses before trial;
- (iv) To encourage open and honest testimony from grand jury witnesses;

⁶³ Richard Calkins, *The Fading Myth of Grand Jury Secrecy*, 1 J. MARSHALL J. PRAC. & PROC. 18, 18-19 (1967-68).

- (v) To protect the reputation of those who are not indicted.⁶⁴

Most of these justifications have merit while a grand jury is actively considering a case, but after the grand jury has indicted a case, only the third and fourth justifications remain relevant. Nevertheless, even those two justifications do not carry much weight after the grand jury has made its decision because the justifications rely on the presumption that the names and statements of the witnesses will always remain confidential. In reality, most court rules require the prosecutor to turn over witness lists prior to trial, and the defendant ultimately has the right to see the prior statements of all witnesses who will testify against him.⁶⁵ Some rules only require that these statements be turned over after the trial witness testifies, but in practice, these statements are frequently turned over to the defense prior to trial.⁶⁶ Thus, the concerns about preventing witness tampering or encouraging honest testimony only apply to grand jury witnesses who are not expected to testify at trial—a very rare circumstance.

Of course, most felony cases do not ever go to trial as over 90% of them plead out.⁶⁷ Thus, most witnesses in the grand jury ultimately will not have their names or testimony disclosed to the defendant. However, the prosecutor cannot guarantee this fact to any of the witnesses at the time of the grand jury proceeding. It is unlikely that a witness will feel more comfortable being open and honest because their names and statements *probably* will not be released to the defendant.

On the other hand, if the grand jury votes *not* to indict the case, then the third and fourth justifications do not apply at all, but the fifth justification (protecting the reputation of the innocent) remains important. However, cases involving police lethal use of force almost always involve a high level of publicity, and the media already will have reported the name of the defendant-police officer. Keeping the grand jury proceedings secret under these circumstances after the grand jury has voted not to indict the case does nothing to protect the reputation of the target of the investigation.

B. Benefits of Transparency

In short, in cases involving police lethal use of force, there are no real benefits to maintaining grand jury secrecy after the grand jury has made its decision. On the other hand, the costs of maintaining secrecy are substantial. Transparency and open proceedings are an important part of our criminal justice system. More transparency enhances accountability among all actors in the grand jury process, and more open

⁶⁴ See, e.g., *United States v. Procter & Gamble Co.*, 356 U.S. 677, 681 n.6 (1958). For a detailed discussion of the evolution of the justifications for grand jury secrecy, see Fred A. Bernstein, *Behind the Gray Door: Williams, Secrecy, and the Federal Grand Jury*, 69 N.Y.U. L. REV. 563, 594-603.

⁶⁵ Micah Schwartzbach, *Criminal Discovery: The Right to Evidence Disclosure*, LAWYERS.COM (Jan. 27, 2016), <http://criminal.lawyers.com/criminal-law-basics/criminal-law-right-to-evidence-disclosure.html>; see also Paul Bergman, *Discovery: What and When the Prosecution Must Disclose*, NOLO.COM, <http://www.nolo.com/legal-encyclopedia/what-when-the-prosecution-must-disclose.html> (last visited Mar. 27, 2017).

⁶⁶ See FED. R. CRIM. P. 26.2; see also Bergman, *supra* note 65.

⁶⁷ Lindsey Devers, *Plea and Charge Bargaining Research Summary*, BJA (Jan. 24, 2011), <https://www.bja.gov/Publications/PleaBargainingResearchSummary.pdf>.

proceedings lead to a greater public understanding of the role of the grand jury. In contrast, the secret nature of the proceedings leads to public mistrust of the grand jury, a loss of legitimacy for the institution, and the potential of abuse by prosecutors.⁶⁸

Today, the primary consequence of grand jury secrecy is that it maintains the prosecutor's power over the institution.⁶⁹ Because of the lack of evidentiary rules in the grand jury and the absence of any judicial review of the proceedings, the prosecutor has an extraordinary amount of power in the grand jury.⁷⁰ The secrecy provisions reinforce this power, giving the prosecutor nearly unfettered discretion to conduct the grand jury in any way she believes to be appropriate, with no oversight from the courts or the public.

Liberalizing grand jury secrecy rules does not have to be a radical proposition. There are some aspects of grand jury secrecy that are well-founded, such as keeping the names, deliberations, and votes of grand jurors confidential. There is no real cost to these types of secrecy, and disclosure of any of this information could conceivably disrupt the grand jury's ability to work fairly and impartially. Furthermore, reform measures could liberalize grand jury secrecy rules only in certain types of cases in which the cost of the secrecy is high and the benefits of liberalizing are considerable. Prosecutors also could make motions to protect certain other types of confidential information, such as the names of undercover police officers or the names of sexual assault victims, on a case-by-case basis. Finally, the procedure for releasing grand jury transcripts could be carefully designed to avoid opening up a floodgate of demands for every case that is brought in front of the grand jury. For example, the rules could be amended to create a presumption of secrecy but allow a member of the public to overcome that presumption if he or she could demonstrate that release of the transcript were in the public interest.⁷¹

IV. CONCLUSION

The current lack of transparency in grand jury proceedings not only encourages illegitimate uses of the grand jury, but it also makes it difficult to evaluate whether

⁶⁸ Randall Eliason, *In Defense of the Grand Jury (Part 2): Grand Jury Secrecy*, *SIDEBARS* (May 25, 2016), <https://sidebarsblog.com/2016/05/25/grand-jury-secrecy-in-defense-of-the-grand-jury-part-2/>; see also Lisa H. Wallach, *Prosecutorial Misconduct in the Grand Jury: Dismissal of Indictments Pursuant to the Federal Supervisory Power*, *FORDHAM L. REV.* 129, 134-41 (1987).

⁶⁹ Note, *Restoring Legitimacy: Grand Jury as the Prosecutor's Administrative Agency*, 130 *HARV. L. REV.* 1205 (Feb. 10, 2017), <http://harvardlawreview.org/2017/02/restoring-legitimacy/>.

⁷⁰ Wallach, *supra* note 68, at 129-32.

⁷¹ The Supreme Court's 2016 Task Force to Examine Improvements to the Ohio Grand Jury System recently included such a proposal in its recent recommendations. It proposed amending Criminal Rule 6 of the Ohio Rules of Criminal Procedure to allow any member of the public to move to release the grand jury transcript if (1) the grand jury did not indict the case; (2) the presumption of secrecy was outweighed by the public interest in disclosure; and (3) a significant number of members of the general public were aware of the investigation and the names of the subjects. See OHIO SUP. CT., *REPORT AND RECOMMENDATIONS OF THE TASK FORCE TO EXAMINE IMPROVEMENTS TO THE OHIO GRAND JURY SYSTEM* 14-15 (2016), <https://www.supremecourt.ohio.gov/Publications/grandJuryTF/report.pdf>.

the prosecutor is engaged in such practices. For example, after Officer Daniel Pantaleo killed Eric Garner in Staten Island, New York, the prosecutor's presentation to the grand jury lasted over eight weeks.⁷² The grand jury heard from twenty-two civilian witnesses, saw three different videos of the encounter, and heard from the defendant himself, who testified for two hours.⁷³ In the end, the grand jury returned a no true bill.⁷⁴

Given the large amount of evidence that the prosecutor provided the grand jury in the Garner case, it is possible that the prosecutor legitimately was trying to obtain the grand jury's independent judgment about whether the case should go forward. But, such an interpretation of the investigation is called into question by the prosecutor's disingenuous statements. After the case, the prosecutor said that in New York, the Assistant District Attorney never "attempt[s] to influence the decision" of grand juries.⁷⁵ Yet, in the vast majority of cases, prosecutors obviously attempt to persuade the grand jury to indict the case. Without any disclosure of the transcripts of the grand jury, it is impossible to know whether the prosecutor intentionally tried to dissuade the grand jury from indicting the case or, instead, legitimately gave the grand jury the discretionary power that it has historically wielded.

Indeed, there are some commentators who argue that the Ferguson grand jury that refused to indict Darren Wilson was merely used for political cover.⁷⁶ For example, Professor Trachtenberg argues that the Ferguson prosecutor "abdicated the usual role of the prosecutor, choosing instead to delegate his responsibilities to untrained citizens with inadequate guidance."⁷⁷ However, Professor Trachtenberg's assertion misunderstands—and perhaps underestimates—the potential of grand jurors to provide useful guidance when they are given the proper information. When Robert McCulloch "delegated" the case to the grand jury, he was not abdicating his responsibility; instead, he using one of a prosecutor's most valuable and under-utilized tools in exercising that responsibility. McCulloch's decision to release the

⁷² Andrew Siff et al., *Grand Jury Declines to Indict NYPD Officer in Eric Garner Chokehold Death*, NBC N.Y. (Dec 3, 2014), <http://www.nbcnewyork.com/news/local/Grand-Jury-Decision-Eric-Garner-Staten-Island-Chokehold-Death-NYPD-284595921.html>.

⁷³ David Goodman & Al Baker, *Wave of Protests After Grand Jury Doesn't Indict Officer in Eric Garner Chokehold Case*, N.Y. TIMES (Dec. 3, 2014), <http://www.nytimes.com/2014/12/04/nyregion/grand-jury-said-to-bring-no-charges-in-staten-island-chokehold-death-of-eric-garner.html>.

⁷⁴ Siff et al., *supra* note 72.

⁷⁵ Statement by Daniel M. Donovan, Jr., Richmond Cty. Dist. Att'y, Regarding the No True Bill in The Matter of the Investigation into the Death of Eric Garner (Dec. 3, 2014); see also Ben Trachtenberg, *No, You "Stand Up": Why Prosecutors Should Stop Hiding Behind Grand Juries*, 80 MO. L. REV. 1099, 1101-02 (2015) (arguing that the prosecutor's statements "provide[] strong evidence that [the prosecutor] did not recommend to the Richmond County grand jury that it indict, or that it decline to indict, Pantaleo").

⁷⁶ Trachtenberg, *supra* note 75, at 1109 (arguing that the Ferguson prosecutor had already made up his mind not to indict Wilson before the grand jury released its decision, and at that point, "[h]e . . . should have stood up and announced his decision to the public—whether in writing, at a press conference, or both—instead of hiding behind a dozen anonymous citizens").

⁷⁷ *Id.* at 1100.

grand jury transcript clarifies the situation by allowing the community to evaluate the prosecutors' behavior in the grand jury and determine whether a complete and unbiased case was presented and whether the grand jury received sufficient guidance to make an accurate decision.

A prosecutor's actions in cases involving police officers as defendants will always be somewhat open to suspicion. Prosecutors are dependent upon police officers in order to do their job effectively, and so, many argue that it is impossible for prosecutors to impartially handle a case fairly when an officer is a defendant.⁷⁸ The absolute secrecy of the grand jury process only serves to exacerbate suspicions. Indeed, at least one state has recently banned the use of grand juries in cases of police lethal use of force to ensure that the prosecutor's decision-making process is fully transparent.⁷⁹ Similarly, another prosecutor in a high-profile police shooting case has announced that he will bypass grand juries in all such cases because of their lack of transparency and accountability.⁸⁰ But these solutions go in the wrong direction. If the grand jury's lack of transparency is the problem, the answer is not to ban the grand jury. The solution is to increase the level of its transparency, at least in the cases in which police officers are defendants.⁸¹ Greater transparency will encourage prosecutors to use the grand jury to guide their discretion for these very challenging cases.

⁷⁸ See, e.g., Walter Katz, *Enhancing Accountability and Trust with Independent Investigations of Police Lethal Force*, 128 HARV. L. REV. 235, 239 (2015); see also Steven M. Witzel, *Grand Jury Practice, Protest, and Reform*, N.Y.L.J. (Jan. 15, 2015), <http://www.newyorklawjournal.com/id=1202715176527/Grand-Jury-Practice-Protests-and-Reform?slreturn=20170128151458>.

⁷⁹ See, e.g., Allie Gross, *California Becomes First State to Ban Grand Juries in Police Shooting Cases*, MOTHER JONES (Aug. 13, 2015), <http://www.motherjones.com/politics/2015/08/california-becomes-first-state-ban-grand-juries-police-shooting-cases>.

⁸⁰ David Chanan & Libor Jany, *Hennepin County to Stop Using Grand Juries In Officer-Involved Shootings*, STARTRIBUNE.COM (Mar. 26, 2016), <http://www.startribune.com/hennepin-county-attorney-to-provide-update-into-jamar-clark-inquiry/372229891/>. County Attorney Mike Freeman is in charge of a case in Minneapolis in which an unarmed black man, Jamar Clark, was shot by Officers Mark Ringgenberg and Dustin Schwarze. *Id.*

⁸¹ Professor Kate Levine has suggested that lengthy, fully fleshed-out grand jury presentations should be the norm for *all* felony charging decisions, as part of a more comprehensive "precharge scrutiny" procedure. Kate Levine, *How We Prosecute the Police*, 104 GEO L.J. 745, 770-75 (2016) (arguing that prosecutors have made a choice to "reserve process only for the police and a select few other suspects who have the resources to challenge the process at every stage"). It is unlikely that prosecutors will undergo that scale of reform, but increased transparency would be a feasible first step.